

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Sep2002

CASE NO.: 2002-STA-00013

In the Matter of

MATTHEW P. COPPOLA, SR.
Complainant

v.

QUALITY ASSOCIATES, INC.
Respondent

Appearances:

Stephen J. Courtney, Esquire (Gesmonde, Pietrosimone,
Sgrignari & Pinkus), Hamden, Connecticut, for the Complainant

Jennifer L. Cox, Esquire (Pepe & Hazard),
Southport, Connecticut, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This case arises from a complaint filed by Matthew P. Coppola, Sr. (the Complainant) against Quality Associates, Inc. (the Respondent) under the employee protection provisions of section 405 of the Surface Transportation Assistance Act of 1982 (the STAA), 49 U.S.C. §31105, and the implementing regulations at 29 C.F.R. Part 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. The matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration (OSHA) after investigation of the complaint. 49 U.S.C. §31105(b)(2)(A), 29 C.F.R. §1978.105.

The Complainant filed his complaint on or about June 22, 2001, alleging that the Respondent discriminated against him in violation of the STAA. ALJX 1.¹ After an investigation, the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”) issued the Secretary’s Findings on October 22, 2001 that the evidence showed that the Complainant was not meeting the standards of his position and that his termination was for non-discriminatory reasons. ALJX 1. The Complainant appealed the Secretary’s Findings and requested a hearing before an administrative law judge in a letter which was received by the Office of Administrative Law Judges on November 21, 2001. ALJX 2.²

Prior to the hearing on February 7, 2002, the Complainant filed a Motion in Limine, seeking to exclude the following documents, which the Respondent identified in its pre-hearing submission, as hearsay evidence: May 29, 2001 Correspondence from MJM Builders, Inc.; August 24, 2001 memo to OSHA/U.S. Department of Labor with driving schedule attachments; November 12, 1998 correspondence from Martin O’Neil, attorney for individual injured by Complainant’s driving; January 28, 2000 Summons and Complaint, regarding lawsuit filed against Respondent due to Complainant’s driving. The Respondent filed an Objection to the Motion in Limine on February 7, 2002 as premature.

Pursuant to notice, a hearing was conducted before me in New London, Connecticut on February 11, 2002, at which time the parties were afforded an opportunity to present evidence and argument. An appearance was made by counsel on behalf of the Complainant and the Respondent. Testimony was elicited at the hearing from the Complainant and from Fernand F. Russo, Jr., for the Respondent. I denied the Complainant’s Motion in Limine, indicating that it is customary in proceedings before the OALJ to grant such motions only in exceptional circumstances and to determine the admissibility of evidence as it is proffered by the parties. TR 8-10. Documentary evidence was admitted as ALJX 1-10, CX 1-2 and RX 1-2. TR 7, 62, 81, 97, 156. The Complainant objected to Respondent’s Exhibit RX 2 as hearsay evidence, and I admitted RX 2 for the limited purpose of showing how it influenced the Respondent’s state of mind at pertinent or relevant times in this matter. TR 153-156. The parties subsequently submitted closing argument regarding appropriate relief, and the record was then closed.

Upon careful consideration of the entire record, I conclude that the Complainant has established that he engaged in activity protected by the STAA and that his protected activity was a factor in the Respondent’s decision to terminate his employment. However, I further conclude that the Respondent has shown by a preponderance of the evidence that it would have terminated the Complainant’s employment even if he had not engaged in protected activity. Accordingly, I

¹ The documentary evidence admitted to the record will be referred to as “ALJX” for jurisdictional and procedural documents admitted by the Administrative Law Judge, “CX” for documents offered by the Complainant, and “EX” for documents offered by the Respondent. References to the hearing transcript will be designated as “TR”.

² This matter was originally scheduled before District Chief Administrative Law Judge David W. Di Nardi, but was reassigned to me due to a scheduling conflict. ALJX 5.

recommend that the complaint be dismissed. My findings of fact and conclusions of law are set forth below.

II. Summary of the Evidence

A. The Complainant's Testimony

At the hearing, the Complainant testified that he is a 30-year old high school graduate, who is married with two children. TR 24. He stated that after high school, he worked for Bi-Rite Fuel Oil, Inc. for approximately seven years as a truck driver until the company's bankruptcy in 1998. TR 24-25. In August of 1998, he was hired by the Respondent as a tri-axle dump truck driver. TR 25. The Complainant testified that the Respondent is owned by Fred Russo and his brothers and sisters and has about 15 or 20 employees in the excavation department. TR 25. He stated that he possesses a Class 2 Commercial Driver's License (CDL) which entitles him to drive everything except a tractor trailer, adding that he needed this license to perform his work for the Respondent. TR 26.

The Complainant testified that he worked for the Respondent for about three years. TR 26. He stated that the Respondent's business was excavation, which is building new roads, digging foundations and laying pipe. TR 26. He said that his job involved driving a dump truck to haul materials such as gravel and top soil on an average of 250 to 300 miles per day. TR 26-28. The Complainant stated that Mr. Russo had told him that his job performance was "good" and even "outstanding." TR 27. He also stated that Mr. Russo made positive comments about his knowledge of short cuts to job sites because of his experience as an oil delivery truck driver. TR 27. The Complainant also believed that Mr. Russo was happy with his job performance because he was given most of the overtime tasks. TR 27-28. He testified that he did not miss any work with the Respondent and never took a vacation. TR 28. The Complainant also testified that he was not aware that the Respondent gave regular cost-of-living increases and that Mr. Russo gave him a one-dollar an hour performance raise around the spring of 2000 after another truck driver had quit. TR 28-29.

The Complainant testified that while employed with the Respondent, he had two motor vehicle accidents. TR 29. The first accident occurred approximately two to three weeks after he started working for the Respondent. TR 29. The Complainant stated that the accident happened on a two-lane highway as he approached vehicle that was stopped in the left-hand lane and signaling a left-hand turn. According to the Complainant, a second vehicle in the right-hand lane stopped without using a signal, and the Complainant "rear ended" the vehicle in the right-hand lane. TR 29-30. The Complainant stated that he talked to Mr. Russo about the accident right after work that day, and Mr. Russo told him that accidents happen and that was why he had insurance. TR 30. Regarding the second accident, the Complainant testified that he believed it occurred in the spring of 2000, but, after having his recollection refreshed, agreed that it happened in August 1999. TR 30-32. The Complainant stated that the accident happened on a day when it was pouring rain and he was traveling down a street with his "four-ways" (*i.e.*, emergency flashers) activated on the way back into a development. TR 32. It was necessary for him to cross oncoming

traffic, and the vehicle traveling behind him followed him to the opposite side of the road, which caused the vehicle to hit him when he reversed the truck into the driveway. TR 32-33. The Complainant stated that this accident was not his fault and that he had no further accidents connected with his employment with the Respondent. TR 33.

The Complainant testified that between the time of this second accident and his termination date about two years later, the only discussions he had with Mr. Russo regarding his performance occurred when Mr. Russo urged him to work faster, find shorter routes and move more loads per day. TR 33-34. The Complainant agreed with the characterization of his work atmosphere as “under tight schedules and performance goals” in the late Fall from projects that were started during the previous Spring. TR 34. He stated that four truck drivers, in addition to two contract drivers, generally worked for the Respondent and that he was assigned to Mack tri-axle dump truck, Truck No. 808. TR 34-35. He stated that he was not aware of any safety procedures that he had to follow when he began work with the Respondent. TR 35. However, he was aware of safety procedures from his own experience as a truck driver, which were to do a 30 to 45-minute pre-trip inspection every morning that involves testing the brakes and lights and going through the whole vehicle. TR 35. He testified that the Respondent did not require him to do pre-trip inspections, but he did the inspections himself at 6:00 a.m. every morning. TR 35-36. The Complainant stated that his standard work hours were from 6:45 a.m. to 3:30 p.m., with overtime on some days, and that he was not paid from 6:00 a.m. to 6:45 a.m. TR 36. In addition, he stated that he knew from his previous experience that truck drivers should complete a pre-trip daily log, which was not done at the Respondent’s facility. TR 37. He added that on his first day of employment, he noticed that there was no log and asked Mr. Russo about it, who responded that they did not use daily logs. TR 37. The Complainant testified that the Respondent’s failure to use pre-trip inspection logs could have caused difficulties for him because it might look like he was at fault if something broke. TR 37-38. He also stated that this could cause a problem if the Department of Motor Vehicles pulled him over and asked for the book, which admittedly never happened while he worked for the Respondent. TR 38. The Complainant added that after his discussions with OSHA, he learned that safety manuals and safety meetings were required, testifying that the Respondent did not have either safety manuals or safety meetings. TR 39.

The Complainant testified that during the first week of April 2001, he was having a problem bringing the vehicle to a complete stop, which indicated a problem with the brake pedal, not the parking brake. TR 39-40. He stated that he then called Jim Durso, the quality mechanic, around April 4th or 5th, to inform him of the brake problem. TR 40. Mr. Durso responded that he would take a look at the vehicle that day or the next morning. TR 40. The Complainant stated that he returned to the shop that day just before 4:00 p.m., but the mechanics had left at their usual time of 3:30 p.m. TR 40. He stated that the next morning, Mr. Durso told him that he could not look at the truck because he was really busy and had to fix something on another job site. TR 41. At that time, the Complainant stated that he performed the inspection and started having problems with the parking brake. TR 41. He stated that he talked to Mr. Durso again about the truck at the end of Friday when he was picking up his paycheck, and that Mr. Durso told him that he was going to come into work on Saturday to do some welding and for him to leave a key for the truck. TR 41-42. The Complainant stated that when he arrived at work on Monday morning, the key was in the

same location in the door and the brakes still had the same problem. TR 42. He stated that afterwards, Mr. Durso told the Complainant that he did not work on Saturday. TR 42. Without identifying when this conversation happened, the Complainant testified that he did have a discussion with Mr. Durso about the nature of the brakes and that Mr. Durso told him that the brakes were out of adjustment and could not be adjusted because the slack adjusters were gone. TR 42.

The Complainant testified that on Monday morning, April 9th, he talked to Mr. Russo about the brakes on Truck No. 808, and Mr. Russo told him that there were three other vehicles, but all of them had problems and he had to drive Truck No. 808. TR 43. The Complainant stated that he drove Truck No. 808 that day on public roads, but drove slower and still had difficulty stopping the truck. TR 44. He stated that he continued to drive the truck that week and had discussions with Mr. Durso about every other day and again with Mr. Russo later that week on probably Thursday and Friday of that week. TR 44. The Complainant stated that during a conversation which probably took place on Thursday, Mr. Russo told him that he still did not have another vehicle for him to drive and that he could either drive his truck or go home. TR 44. He stated that he spoke again to Mr. Russo on the following day and that Mr. Russo was irate and said that the situation had not changed, and the Complainant could either drive his truck or go home. TR 45. The Complainant stated that during the next week, he talked to Mr. Durso about the truck's problems, but not to Mr. Russo. TR 45.

The Complainant testified that he was unable to stop the truck during a dump over the top of a hill at Valley Sand and Gravel on the following Monday, April 16, 2001. As a result, he had to drive the truck in reverse the length of the hill in order to make the dump, which was difficult because there were other trucks on the hill. TR 46. When he returned that day, he spoke to Mr. Durso who told him that none of the other trucks were fixed. TR 46-47. The Complainant stated that he also raised his truck's problems again with Mr. Russo who repeated that the situation had not changed; he could either drive his truck or go home. TR 47. The Claimant stated that this was the last time he spoke to Mr. Russo about his truck prior to the accident on April 19, 2001. The Complainant stated that he drove the truck on Tuesday and Wednesday of that week and again experienced brake problems. TR 47-48. When asked why he continued to drive the truck despite brake problems, the Complainant testified that his wife was nine months pregnant, and he needed the money. TR 48.

Regarding the events of Thursday, April 19, 2001, the Complainant testified that he was working at a job in Wallingford, Connecticut, loading top soil from the top of a hill on North Lane and hauling it to Route 68 where it was to be dumped and spread. TR 48-49. He stated that after he dumped the first load, he turned on the truck's right directional signal prior to making a right turn into a lane. He continued that a tractor trailer was waiting to pull out of the lane but did not, after he turned on the directional signal. He thought that this was odd, so he flashed his high beams, and the tractor trailer then moved. TR 50. He then turned on his left signal light, which he could see from the truck's cab, and noticed that the light was out. TR 50. He stated that at that point, he got out of the truck, leaving the signal light on to fix the problem. TR 50-51. He removed the lens cover, changed the bulb, and reconnected the plug, which had come undone. TR

51. As he was putting the lens covers back on, he heard a beep from the excavator operator, signaling that the operator was about to load the Complainant's truck. TR 51. Noticing that he had forgotten to replace the right lens cover, he got out of the truck and stood on the side of the truck with the right, passenger side wheel turned towards him. TR 51. The operator of the excavator was on the left or driver's side of the truck, and the Complainant could not see him. TR 52. The Complainant said that the truck suddenly lurched forward, knocking him down and rolling over his left leg. TR 52. The Complainant testified that his leg was "dangling" when he got up, and he was in a great deal of pain. TR 52. He was able to "pop" his leg back with his right foot and got back in the vehicle. TR 52. By this time, the operator was heading down the hill to retrieve more material. TR 52. The Complainant then released the brake, but he was unable to put his foot down on the clutch, so he put the vehicle into neutral, slowed it down and pulled the emergency brake. He got out of the truck and lay down on the ground where he was spotted by Steven Gianelli, another truck driver who was traveling up the hill. TR 53. The Complainant said that Mr. Gianelli and another employee called an ambulance, and he was taken to the Yale Hospital. TR 53-54. The hospital staff took x-rays, ran a CAT scan for possible head injury and did not find anything broken. According to the Complainant, he was held overnight due to concern about a possible blood clot because his leg was swollen. TR 54.

The Complainant testified that Mr. Russo did not come to the hospital, but he called Mr. Russo's home that night from the hospital and told him about the accident. TR 54-55. He stated that after his release the next day, he called Mr. Russo's sister, Theresa Fiori, who told him that he would receive two-thirds of his pay. TR 55-56. The Complainant stated that he was using crutches and wearing a full leg brace at that time. TR 57. After a doctor's visit on Tuesday, it was determined that the leg was badly bruised and needed to be drained. TR 57. On Wednesday, he called Ms. Fiori and asked her to have Mr. Russo call him, and when he had not received a call by Thursday, he called Mr. Russo. TR 58-59. The Complainant testified that Mr. Russo told him to call his sister, that she had a number for him to call and that "I have to be cleared of this a hundred percent." TR 59. The Complainant stated that he immediately called Ms. Fiori who instructed him to call Jeff Ritter, an OSHA representative in Bridgeport. TR 60.

The Complainant called Mr. Ritter who came to the Complainant's house on Saturday with another representative to take a statement about the accident. TR 61. He identified CX 1 as the statement that he gave to the OSHA investigators on April 27, 2001. TR 62. He said that he met with the OSHA representatives for a couple of hours about the accident, and he testified that he was not entirely truthful about the problems with the truck's brakes in that he told the investigators that there had been no problems. TR 62-63. The Complainant explained that he lied to protect his job and his health coverage, particularly because he had a baby due on May 6. He further explained that Mr. Russo's statement was the sole reason that he was not truthful with the OSHA investigators. TR 63.

Referring to page 5, Question No. 44 of the statement (CX 1), where he stated that the Respondent posted safety rules next to the time clock, the Complainant testified that these rules were more like "jokes". TR 63-64. He added that the Respondent does not have a safety program or a health program. TR 64. Regarding "I don't remember" response to Question No. 46 (Do any

of the rules state not to get out of the truck while being loaded or parked?), the Complainant testified that this answer was inaccurate and he did not believe there were any rules. TR 64. Regarding Question No. 47 (whether Mr. Russo ever instructed the Complainant on safety rules, including not getting out of the truck while being loaded or to trap the wheels when the truck is parked), the Complainant testified that Mr. Russo never did that. TR 64. The Complainant also testified that he did not respond truthfully to Question No. 53 when he stated that he checked the brakes during his morning pre-trip and they were functioning and that Mr. Russo does not send out trucks if there is something wrong with them. TR 65. Contradicting his statement to OSHA, the Complainant testified that his truck did in fact move during his check of the brakes and that Mr. Russo does not maintain his equipment which, he asserted, is evidenced by his truck having only one oil change in 100,000 miles. TR 65. In addition, the Complainant stated that his response to Question No. 57 that the truck did not have any past problems with unexpected movements was not accurate. TR 65-66. According to the Complainant, the OSHA investigators representatives did not warn him about any criminal or other sanctions for giving inaccurate statements, and he stated that he was not aware of any such sanctions. TR 66. He stated that the investigators printed his statement from a laptop computer, and he signed it. TR 66.

On the Monday following his meeting with the OSHA investigators, the Complainant testified that he had a conversation with Ms. Fiori and expressed to her that he tried to cover the company as much as he could. TR 66-67. He stated that he also tried to explain this to Mr. Russo, but Mr. Russo did not return his phone calls. According to the Complainant, Ms. Fiori told him that Mr. Russo was not mad at him, just busy. TR 67-68.

The Complainant testified that he continued to see doctors for his leg and received a return-to-work slip for Tuesday, May 22, 2001. TR 68. He then brought the slip to the Respondent's facility where Mr. Russo yelled at him, stating that he had caused problems with OSHA, that OSHA was now going through his paper work and that the Complainant had known of his previous experiences with OSHA. TR 69-70. He testified that Mr. Russo said that the Complainant had "screwed him" and had "stirred the shit" with OSHA. TR 71. The Complainant stated that he apologized to Mr. Russo and asked if he was going to return to work the next day, to which Mr. Russo responded that he would call him that night. TR 71. When asked of his knowledge of the Respondent's previous experiences with OSHA, the Complainant stated that he had heard about two accidents, one of which involved a death. TR 71.

On the evening of May 22, 2001, the Complainant stated that he received a call from Mr. Russo who told him that he would see him the next morning. TR 72. He stated that he reported to work the next morning and, during his pre-trip inspection, he noticed that the brakes on his truck still had the same problem and that nothing had been done to them. TR 72. He did not talk to Mr. Russo at that time because of his concern about the previous day's conversation; instead, he spoke to Mr. Durso who informed him that the brakes were out of adjustment and could not be adjusted because the slack adjusters were gone. TR 73. The Complainant explained that the slack adjusters are a major component of the brakes. TR 73. He stated that he was "outraged" by this situation, but he drove the truck that day slowly because he was afraid of losing his job. TR 74-75.

The Complainant also testified that a new employee began work that day and drove a Volvo tri-axle dump truck. TR 74-75.

The Complainant testified that when he did speak to Mr. Russo about the unrepaired brake problem the next morning, he suggested that the Complainant drive another truck which was usually driven by Steve Gianelli but was available that day. TR 75-76. He agreed and drove Mr. Gianelli's truck for the remainder of his employment with the Respondent. TR 76. On Wednesday, May 30, 2001, the Complainant stated that two new employees began work, and one of them was assigned to drive Truck No. 888 which had just undergone a brake job. TR 76. He then asked Mr. Russo if he would be driving Steve Gianelli's truck indefinitely, and Mr. Russo responded that he had not figured it out yet. TR 76.

The Complainant testified that on Friday when he went to pick up his check, Mr. Russo called him into his office. He said that Mr. Russo told him that he had cost the company \$7,000 in brakes and that he would have to let the Complainant go but would give him a pink slip. TR 77-78. The Complainant stated that he pled with Mr. Russo to reconsider because he had a new baby and needed health insurance. Mr. Russo again blamed him for the OSHA investigation but said that he would think about it and call over the weekend. TR 78. He stated that Mr. Russo did not call him over the weekend, so he called Mr. Russo at his home on Sunday evening and left a message. TR 79. The Complainant recounted that Mr. Russo returned his call at about 6:00 a.m. the following morning. The Complainant said his ensuing conversation with Mr. Russo was "quick" and that Mr. Russo told him that "it's over." TR 79. The Complainant stated that he immediately called Mr. Russo back to ask his reasons, and Mr. Russo explained that he had thought about it but had not changed his mind. TR 79-80. According to the Complainant, Mr. Russo then began to yell, saying that he would call the police and have the Complainant arrested for harassment if he ever called him again. TR 80. The Complainant testified that he did not yell during this conversation and said that Mr. Russo did not mention the OSHA investigation. TR 80.

The Complainant testified that he filed his OSHA complaint on June 19, 2001. He went to Bridgeport where he met with Gay Dinnis and signed a statement dated June 27, 2001 which was admitted as CX 2. TR 80-81. He testified that this statement contains a truthful account of the events. TR 81-82. The Complainant stated that he did not have a poor driving record with the Respondent and, aside from the two accidents, his record was clear. TR 82. He added that he believed he had a good work ethic in that he worked 45 minutes every day without pay and often through lunchtime. TR 82. He stated that he had never been disciplined, reprimanded, or given any indication that he had performance problems. TR 82. He denied speeding during May 2001 and said that he did not drive through any sub-divisions during that time because truck drivers entered on the opposite side, or the last stage, of a five-stage development. TR 82-83. He further stated that no one spoke to him about speeding through the sub-divisions. TR 83-84. He testified that the only thing Mr. Russo ever said about his driving pace was to tell him to drive faster in order to do enough loads per day. TR 84.

The Complainant testified that he was not belligerent to management at any time, and he denied threatening or raising his voice during his last conversation with Mr. Russo. TR 85. The

Complainant stated that although Mr. Russo gave him a pink slip which listed "lack of work" as the reason for his termination, he knew he had been fired. TR 85-86. He stated that Spring is a busy time and that there was no lack of work at the Respondent. TR 86. The Complainant stated that he has not worked since June 1, 2001. He further stated that he was not able to work as of the date of the hearing because his left knee remains in bad condition from the April 19, 2001 injury at the Respondent's job site. TR 86. He stated that his rate of pay was \$16.00 per hour at the time of his termination and that he worked 55-60 hours per week, including overtime. TR 86-87. He added that his fringe benefits were family health coverage and profit sharing, stating that family health coverage was \$975.00 per month. TR 87.

On cross-examination, the Complainant testified that he spoke to Mr. Russo about his complaints with the brakes at least three, four, or five times in April 2001. TR 90. When the Complainant was asked why he stated in his June 27th statement to OSHA (CX 2) that he "hadn't spoken with Fred again because it would have caused an argument," he testified that he was referencing the last time he spoke to Mr. Russo, that if he did so again, it would have caused an argument. TR 90-91. He was then asked why he stated in his direct testimony that his first complaint did not include the parking brake, when the June 27th statement to OSHA (CX 2) states that his complaint "included the parking brake." TR 92. The Complainant explained that his first complaint to Mr. Durso did not include the parking brake, but that his first complaint to Mr. Russo did include the parking brake. TR 92. The Complainant testified that he complained to Mr. Russo about the parking brake three or four times. TR 92. When asked why he neglected to reference these three or four occasions in his June 27th statement, the Complainant responded that by stating that he "hadn't spoken with Fred again" in the June 27th statement, he meant only that he had not spoken to him after the last time. TR 92.

The Complainant testified that the Respondent did not have a safety program and that he was not aware that the Respondent had a safety program on file with OSHA. TR 92-93. He concluded that the Respondent did not have a safety program because one was never brought to his attention, either at the time he was hired or during his employment. TR 93. He added that Theresa Fiori also made a statement to him that she was going to have to make up a booklet after the Complainant made his first statement to OSHA. TR 93. The Complainant testified that the OSHA representatives came to his house on a Saturday to take his statement and that he knew it was a Saturday because he remembered it being odd they would come out on that day. TR 93. When asked if it would surprise him that April 27, 2001 was a Friday, he responded affirmatively and stated that he believed he signed the statement on April 27, 2001 in the presence of the OSHA investigator. TR 94.

The Complainant was questioned about his return to work after the accident, and he testified that he saw Dr. Kinair on Tuesday, May 22, 2001. He stated that he received a return-to-work slip from the doctor and went to the Respondent's facility that day. TR 94-95. After being shown the return-to-work slip (RX 1), the Complainant acknowledged that the date on the upper left-hand corner was "5/15" which was a Tuesday. TR 95. When asked if he had gone to Dr. Kinair's office on May 15, 2001 and was cleared for work, the Complainant responded, "I guess so." TR 95. The Complainant also testified that the "5/30" date on the bottom, right-hand corner

of the slip was for a follow-up appointment. TR 95-96. However, the Complainant then insisted that he had seen Dr. Kinair on May 22, 2001 and stated, "I believe these dates [on Dr. Kinair's return-to-work slip] to be wrong." TR 96.

The Complainant testified that he was laid off twice for seasonal reasons by the Respondent prior to June 1, 2001. TR 98. He stated that he never took a vacation during the time he worked for the Respondent and did not know how many weeks of work he had lost due to lay-offs. TR 98. He stated that Mr. Durso told him that a slack adjuster adjusts the brakes. However, he stated that the drivers were not responsible for maintaining the slack adjusters on their trucks and said that he had never greased or maintained the slack adjusters on his truck. TR 98-99. He denied any knowledge that general safety precautions and procedures would require that he not be outside of his truck while it was being loaded. TR 99.

The Complainant testified that the state police pulled him over once while he was driving his truck because there was a mud flap missing on the vehicle. TR 99. He added that they did not check the truck out while he was pulled over. TR 99-100. He stated that he did not recall blowing out the transmission on his truck and further stated that it did not happen. TR 101. He testified that all of the answers to questions one through eight on his April 27, 2001 statement to OSHA (CX 1) were true. TR 101-102. He stated that he arrived at work on April 19, 2001 at 6:00 a.m., and he was unable to explain why he told OSHA investigators in his April 27, 2001 statement (CX 1) that he arrived for work at 7:00 a.m. TR 102-103. With regard to the accident, the Complainant stated that he got out of his truck to change a light lens cover and stood up against the truck even though he believed that the brakes were defective. TR 104-105. He repeated that he never knew that a driver should not be outside of a truck while it is being loaded. TR 105. He stated that his answer to Question No. 39 in the April 27, 2001 statement (CX 1) is correct. TR 107-108. He restated his direct testimony that he did not depress the clutch while shifting the truck into low gear. TR 108. He clarified his response to Question No. 39, stating that he meant that he got up quickly, not that his feet left the ground, when he said he "jumped up." TR. 108-110. He stated that he did not put a wheel chock underneath his wheel on the date of the accident, and he said that he believed that the truck moved forward twice, once to knock him over and then again running over his leg. TR 110-111. He further testified that a truck with its parking brake on is not likely to move forward when an excavator hits the truck. TR 111-112.

The Complainant testified that Mr. Russo never complained about his driving recklessly or that he had driven recklessly behind Mr. Russo's on a highway. TR 112. He acknowledged using a cell phone issued by the Respondent for personal calls. TR 112-113. The Complainant next testified that Mr. Russo told him on the Tuesday before he began work that his mechanic was not a certified mechanic or welder. TR 113. He then stated that on May 24, 2001, the day Mr. Russo gave him a new truck to drive, he observed his usual truck, No. 808, in the shop. TR 115. He restated his direct testimony that during his week back at work, he drove Steve Gianelli's truck. TR 116. Regarding his telephone conversation with Mr. Russo on Monday morning after he was terminated, the Complainant testified that he did not threaten to go to OSHA, but told Mr. Russo that he had covered for him in his statement to OSHA. TR 117. He stated again that he did not yell during this conversation. TR 117. He testified that his answer to Question No. 55 in the April

27, 2001 statement, regarding his testing of the truck's air compressor, was correct. He added that during his pre-trip inspection on April 19, 2001, the pressure gauge read 120 PSI, but that he did not check the pressure gauge at or after the time of the accident. TR 118-120.

On redirect examination, the Complainant elaborated on his testimony regarding personal cell phone use, stating that he was told that personal use within reason was not a problem because there were a lot of free minutes on the phones. TR 121. He further stated that no one had ever told him that there was a problem with his cell phone use and that he was told he had the third lowest charges out of five employees. TR 121. He further testified that there was not a wheel chock in his truck and that it had come out of Steve Gianelli's truck. TR 122. He added that there were safety regulations that required the chock to be in his truck. TR 122. Regarding his response to Question No. 9 in the April 27, 2001 statement that he started work at 7:00 a.m. on April 19, 2001, the Complainant explained that Mr. Russo had put a post-it note on his time card which advised that his start time for pay was 7:00 a.m. Thus, he maintained that his response to this question was, in fact, true. TR 122-123.

B. Testimony of Frank Russo, Jr.

Mr. Russo testified that he is one-third owner of the Respondent, an excavation company, along with his sister, Theresa Fiori, and brother, Steven Russo. TR 125. He stated that he runs the excavation division, which builds new roads and does paving and pipe work for roads. TR 125. He further testified that the Respondent employed the Complainant as a driver of a tri-axle dump truck, which hauls material, such as asphalt and stone, to and from job sites. TR 126. He stated that in 2001, the Respondent owned five tri-axle trucks, three of which were on the road because they had a layoff of two drivers during the customary shutdown after Christmas 2000. TR 126-127. He also stated that he used two sub-contractors who drove their own trucks. TR 127.

Mr. Russo testified that at the time he hired the Complainant, he conducted a customary license check and discovered that the Complainant had been involved in some accidents. TR 127. He continued that he hired the Complainant at the request of the Complainant's brother Dave when Dave's business, Bi-Rite Fuel, was closed. TR 127-128. Mr. Russo further testified that the Complainant was involved in two or three accidents while employed for the Respondent. TR 128-129. He also stated that the Complainant had a long history of speeding, often being the first driver to arrive at and to return from a job. TR 129. He added that the Complainant also had a habit of downshifting one too many times and, on one occasion in January or February of 2000, the Complainant blew out the transmission when he exited a highway and allegedly downshifted one too many times. TR 128-129. Despite these incidents, Mr. Russo stated that he did not terminate the Complainant because he operated a "family business" and because the Complainant had a family. TR 129. He testified that he had numerous conversations, about six to eight times per month, with the Complainant about his driving too fast, and that other drivers complained about his speeding. TR 130.

Mr. Russo testified that a pre-trip inspection is normally done by the drivers every morning before the truck goes out. TR 130. If the driver notices a problem, the driver is supposed to

immediately notify him and he, in turn, immediately notifies the mechanic. TR 131. He further testified that the trucks have inspection sheets inside them so that the drivers can write down problems with the truck or pre-inspection and that if there is not an inspection sheet, the driver can note any problems their work sheet. TR 131. Mr. Russo testified that the Respondent does have a safety policy which was given to OSHA. TR 131. He also stated that the Respondent posts OSHA citations and safety rules and regulations by the employees' time clock. TR 131.

Mr. Russo testified that a slack adjuster is a device used to automatically adjust brakes. TR 131-132. He added that the Respondent implemented a rule in 2000 that drivers were responsible for greasing all incidentals of the truck, including the slack adjusters. He further stated that the mechanic shop was open at 6:00 a.m. and, if there were problems that the drivers could not handle, a mechanic would take care of them. TR 132.

Mr. Russo testified that the Complainant typically arrived at work between 6:00 and 6:15 a.m. and that he, himself, usually arrived between 6:00 and 6:30 a.m. TR 132-133. He continued that, on the few occasions when he saw the Complainant at work at 6:00 a.m., he was with a number of people that would customarily sit in their parked cars and talk, smoke, and drink coffee. TR 133.

Mr. Russo testified that his nephew, who was hired in November or December of 2000 as a driver, complained to him that the other drivers were speeding and driving recklessly and that he had difficulty keeping up with the other drivers because he was driving a truck with a smaller engine. TR 136-137. He added that his nephew brought this complaint to his attention, "along with two other drivers that had — that were complaining in the interim of [the Complainant's] employment with me." TR 137. Mr. Russo described an incident where his father told him that one of the Respondent's trucks, which he later determined was the truck usually driven by the Complainant, had cut him off on the highway. According to Mr. Russo, his father said that the driver was dangerous and should be fired. TR 137-138. He told the Complainant the following morning that he had saved the Complainant's job because he had nearly run Mr. Russo's father off the road. TR 138. Mr. Russo said that the Complainant acknowledged the incident and apologized. TR 138.

Regarding any complaints by the Complainant about his truck's brakes prior to his accident, Mr. Russo testified that the Complainant complained to him in February of 2001 of an leak in an axle seal, which holds oil inside the axle to keep it cool on the brake system. TR 138. He stated that he told the Complainant to help the mechanic with the problem and that they then worked together to replace the axle seal and the brakes because the brakes were soaked with oil. TR 139. He added that, even though he was not a mechanic, he believed that an axle seal leak would not inhibit brake function, but would cause the brakes to smoke uncontrollably if applied. TR 139. He denied that the Complainant ever made any more complaints to him about the brakes. He also stated that the mechanic never reported to him that the Complainant had made any such complaints. TR 139-140.

Mr. Russo testified that he was notified about the accident on April 19, 2001 when John Baron, a supervisor, called and told him that the Complainant had been was knocked down and his leg was rolled over by the front of the truck. TR 140. He stated that he immediately went to the job site, finding that the ambulance had just taken the Complainant away and that no one had witnessed the accident. TR 141. Mr. Russo said that the excavator is a 90,000 pound machine which is capable of moving a truck parked on an incline, even if the brakes were functioning properly. TR 141. He stated that the police then arrived, inspected the truck and wrote a report. TR 142. The Respondent's mechanics, Jim Durso and Jim Carbone, came out to the site and Mr. Durso, the main mechanic, inspected it quickly and Mr. Carbone, who has a CDL license, drove the truck back to yard. TR 142-143. Mr. Russo stated that upon entering the driveway, Mr. Carbone stopped on the hill, pulled out the parking brake, put the truck in gear, and let out the clutch, which caused the truck to stall, indicating that the brakes were holding. TR 143. He stated that the next day, the truck was thoroughly inspected and no malfunction was found. TR 144. During the time that the Complainant was out on leave, the truck was kept in the yard as a spare which was sometimes driven by Mr. Carbone, who did not complain about any problems. TR 144.

Regarding his conversation with the Complainant on the day the Complainant went to the Respondent's facility after the accident to report back to work, Mr. Russo stated that he asked the Complainant if he had learned a lesson in that if a truck is on a 10 percent incline and being loaded, he should stay in the truck and not stand in front of it. TR 144-145. He said that the Complainant was apologetic and admitted he was wrong. TR 145. Since he did not have the return to work slip, which the Complainant stated he had given to Ms. Fiori, Mr. Russo told the Complainant that he would call him that evening. TR 146.

Mr. Russo testified that two fatalities had occurred at the Respondent's job sites. TR 146. He described the first fatality as occurring in 1989 or 1990 when a worker was crushed by a machine that was being used to unload a shoring box from the back of a pickup truck. TR 146-147. He stated that the second fatality happened in approximately 1992 when a shoring box was positioned incorrectly in a trench. TR 147. He said that each of these workers had a family and that he was concerned that there was a very good possibility that the Complainant would be injured because of his behavior. TR 147.

Mr. Russo testified that the Complainant drove Truck No. 808 on May 23, 2001 and told Mr. Russo in the morning on May 24 that something was wrong with the brakes. TR 147-148. He testified that he told the Complainant that he could take either of the two other trucks available, adding that these trucks had been available all though April. TR 148. Mr. Russo stated that the Complainant took a different truck, and Truck No. 808 remained parked in the yard for two days awaiting his mechanics' availability. TR 148. Mr. Russo stated that he did not work on May 24, but that he verified this. TR 149. He also stated that he reviewed the mechanic's daily work sheet and he had not worked on Truck No. 808 on May 24. TR 149.

Mr. Russo testified that the Complainant was assigned in late May 2001 to work at Indian Rivers Estates in Clinton, Connecticut where the Respondent was doing a project for MJM

Builders. TR 149. He stated that Mike Milano, vice president of MJM Builders, called and complained to him that the police were monitoring the project for the Respondent's trucks due to numerous complaints of excessive speeding through the project. TR 150. Mr. Russo said that he spoke to all of his drivers the following morning and told them to slow down before someone is killed or he loses his client. TR 150-151. He added that he suspected the Complainant, but did not single him out. TR 151. Mr. Russo further testified that after the phone call, Mr. Milano sent him a letter (RX 2) by facsimile transmission on May 29, 2001, referencing license plate J46150. TR 151-153.³ He stated that he verified that this was the truck the Complainant was driving on the MJM job. TR 153, 157-158. He added that he had the Complainant drive that truck instead of Truck No. 808 because it was a slower truck with a smaller engine and he had problems with the Complainant in Truck No. 808. TR 158. Mr. Russo testified that he went to the Indian River Estates job once or twice a week during May of 2001. TR 150. He stated that there is one accessible entrance and a construction entrance for the final phase, which at the time was impassable due deep mud and blocked off with a log. TR 157.

Mr. Russo testified that he hired a new driver, who started on May 21, 2001, which was before the Complainant spoke to him about the return to work slip. TR 158. He continued that he hired two additional drivers who started around May 30, 2001. TR 158. He stated that he needed three new drivers because he was doing a project that required off-site vehicles, and he needed drivers who could drive these trucks, as well as the tri-axle trucks. TR 158-159. He stated that he had six available drivers in May of 2001, including the Complainant, and had seven trucks available and was expecting an additional truck. TR 159. He testified that he did not hire these new drivers because he intended to lay off or fire the Complainant. TR 159. He further testified that he waited until June 1, 2001 to lay off the Complainant despite receiving the letter and phone call from Mr. Milano on or before May 29, 2001 because the work week starts on Wednesday, and decided to let the Complainant receive a check for Wednesday through Friday. TR 159-160. He added that he had been thinking about letting the Complainant go for a long time and that the decision did not have anything to do with any complaints he made about the brakes. TR 160. Mr. Russo testified that he told the Complainant on June 1, 2001 that he was going to be laid off, that his speeding was an ongoing problem, and that he had been singled out for speeding through the MJM project by his license plate number. TR 160-161. He also told the Complainant him to take the layoff slip, that he was not firing him, but laying him off, and finished by saying that they if things picked up and his attitude changed in a month or two, he would consider hiring the Complainant back. TR 161. He added that they shook hands, the Complainant asked him to reconsider, and he told him that he would call him over the weekend. TR 161. Mr. Russo testified that he did not call the Complainant over the weekend. However, when he arrived at his home after 11:00 p.m. on Sunday night, there was a message on his machine from the Complainant. TR 162. He called the Complainant the next morning around 5:45 a.m. and told him that he was not changing his mind. TR 162. He added that, if he had to search his soul, he probably would have considered hiring him back. TR 162-163. After they hung up, Mr. Russo stated that the Complainant called him back and told him that he had lied to OSHA for him. Mr. Russo testified

³ As discussed above, the MJM letter was admitted over the Complainant's objection for the limited purpose of establishing Mr. Russo's state of mind. TR 153-156.

that this was the first that he had heard of the Complainant lying to OSHA, and he responded that he did not hold a gun to the Complainant's head and if the Complainant told OSHA some things, it must have been the truth. TR 163. He stated that the Complainant responded that Mr. Russo was screwed and that he was going to "get" him by calling OSHA. TR 163. Mr. Russo said that he became very upset at this point, and the Complainant apologized. Mr. Russo said that he told the Complainant that he would call the police if he called back because the Complainant was threatening and harassing him. TR 164.

Mr. Russo then testified that Mr. Durso, who is a certified brake mechanic, looked at Truck No. 808 on either May 25 or 26, 2001 and found that an axle seal was blown, that the slack adjusters were frozen because they had not been greased in a long time, and there was oil on the brakes. TR 164-165. He said that there was "probably 60 percent left on the brakes." TR 165-166. He continued that the mechanic found nothing wrong with the parking brake which is also called a maxi-brake. TR 166. Mr. Russo denied telling the Complainant that it cost \$7,000 to repair the brakes or that it even cost \$7,000 to repair the brakes. TR 166.

Mr. Russo testified that the situation with the brakes on Truck No. 808 did not influence his decision to layoff the Complainant. TR 167. He described his conversation with the Complainant on June 1, 2001 as "heated" on both sides and said that afterwards, he determined never to rehire the Complainant because he "didn't want to deal with it anymore", referring to the Complainant's speeding and neglect of vehicle maintenance. TR 167.

On cross-examination, Mr. Russo testified that the Respondent employs approximately 100 people and has been in existence for 50 years. TR 168. Regarding the two fatal accidents, Mr. Russo testified that the company was cited and paid a fine. TR 168-169. He also stated that he believed that OSHA also found operator neglect and that one of the deceased workers was cited for failure to wear a hard hat. TR 169. Mr. Russo added that OSHA had cited the Respondent in October of 2001 for a trench collapse, which resulted in an injury. TR 169-170. He did not recall any other OSHA citations. TR 170.

Mr. Russo testified that the company has had a safety manual in effect for probably 10 years. TR 170. He stated that the manual is not made available for all employees, but that some rules and regulations are usually posted near the time clock. TR 170. He testified that he would customarily hold informal meetings with the drivers once every month or every other month to verbally go over safety procedures. TR 171. He did not know if he was required to have formal safety meetings, but stated that Steve Biassi from OSHA told him that formal safety meetings were a good idea and may have told him they were a requirement. TR 171-172.

Regarding truck inspection, he testified that the drivers are supposed to complete daily inspection sheets and daily work sheets and, if they are out of inspection sheets, to use the work sheets. TR 173-174. When asked if the drivers complete inspection sheets, he testified that, currently, one of three drivers gives them to him. TR 174. He restated his direct testimony that the Complainant would typically arrive at 6:15 a.m. and that he never physically saw him inspect his truck. TR 175. He then stated that he paid the Complainant for time worked between 6:00

a.m. and 6:45 a.m. if he was required to start work early to be on the job and after he adopted the policy that the drivers must maintain the trucks if the time card indicated that he arrived before 6:45 a.m. TR 175-176. He continued that employees are supposed to punch in their time cards, and the Complainant wrote in his time, but that it was not a problem because he knew when the drivers worked and took them at their honor. TR 176-177.

Mr. Russo testified again that he warned the Complainant constantly about his speeding and stated that the Complainant was lying when he testified that he never was warned about excessive speed. TR 177. He then stated that he gave the Complainant a raise on May 5, 2000 and that he has a standard practice of giving cost of living raises. TR 177-178. When asked if he planned these raises for specific dates, he responded that it was difficult for him to say because his sister handled pay raises. TR 178.

He testified that the Complainant never complained to him about the brakes on Truck No. 808 before the accident and that he never had conversations where he told the Complainant that he had no other truck for him to drive. TR 178-179. He stated added that he never told the Complainant that he'd had enough and not to bring it up again, and he did not recall Mr. Durso ever telling him that the Complainant had a problem with his truck. TR 179. However, he did recall the Complainant coming into his office around February of 2001 with a problem, which the Complainant and Mr. Durso handled together. TR 179-180. He emphasized that it was not February of 2000 because the Complainant was laid off at that time due to a difficult winter. TR 180. He then testified that he believed the incident with his father happened during the Summer of 2000. TR 180.

Regarding the Complainant's habit of downshifting, Mr. Russo testified that he knew it was a problem because his trucks are equipped with a "jake brake" and make a distinct sound if the driver downshifts while turning a corner. TR 181. He stated that he knew when the Complainant was coming because of this sound. TR 181. He reiterated that he frequently spoke to the Complainant about his speeding and downshifting, and he denied that he ever told the Complainant to speed up in order to complete more hauls as safety is his first priority. TR 181-182.

Mr. Russo testified that the OSHA investigation of the Complainant's accident resulted in a citation and fine, but he did not recall the specifics. TR 183. He stated that he believed the citation was for failure to send the Complainant a written letter that he should chock the wheels. TR 183. He denied making a statement to the Complainant that he was unhappy with him due to the OSHA investigation. TR 183-184. He did not recall telling the Complainant to call his sister about OSHA. TR 184. He added that he did not believe that he ever had a conversation with the Complainant about OSHA and said that he had given the OSHA representatives the Complainant's phone number, address, and license number a day or two after the accident. TR 184-185. He did not recall ever talking to the Complaint by telephone around April 26 or telling the Complainant that he should call his sister about talking to OSHA or that he should call OSHA. TR 184-185. In addition, he denied ever telling the Complainant that he better be cleared on this one hundred percent. TR 185. He did remember that the Complainant called his sister about workers'

compensation procedures. TR 186. He denied that he ever told the Complainant that he “screwed” him or “stirred the shit with OSHA” complaining that OSHA was now going through his records. TR 187. He testified that OSHA never came to his office to go through his books or to inspect his trucks to the best of his knowledge. TR 187.

Mr. Russo testified that he terminated the Complainant primarily because of his speeding and bad driving habits and, secondarily, because business had slowed down. TR 190. As evidence of the slow down of business, he stated that one of the new drivers hired on May 30, 2001 never returned the following week. TR 190. Mr. Russo emphasized that the Complainant was “laid off” and not “terminated” or “fired” because of a combination of the two reasons. TR 191. He testified that he told the Complainant that he did not want to fire him, but was laying him off. TR 191. Mr. Russo stated that he verbally reprimanded the Complainant about his speeding, but he acknowledged that he did not document this in the Complainant’s personnel file because he ran a “family business” and it was not his practice to do so. TR 192-193. He also acknowledged that the Complainant’s two accidents in 1998 and 1999 were not recent in relation to the termination of the Complainant’s employment. TR 194.

Mr. Russo testified that Truck No. 808 was used three or four days a week between the time of the accident and May 24, 2001 when the Complainant returned to work. TR 195. Regarding repair work to Truck No. 808 on May 25th or 26th, he stated that the mechanic repaired an axle seal leak and, possibly, the brake linings, slack adjusters and brake drums. TR 195-197. He said that he did not know the cost of the brake repair. TR 196. Mr. Russo testified that the Complainant constantly disregarded truck maintenance, including greasing the truck. TR 197. He continued that he discovered this when Mr. Durso complained about the condition of the trucks, adding that “it’s very doubtful” that the Complainant was greasing his truck. TR 198. Regarding damage to the trucks allegedly caused by the Complainant’s bad driving, Mr. Russo testified that he had to replace an idler sometime during the year 2000 because the Complainant must have driven over something. TR 198. He stated that the Complainant also constantly caused tire blowouts, and he cited an incident on a job in Wallingford where the Complainant drove the truck over a large rock, forcing Mr. Russo to replace a brand new \$750 tire around October or November of 2000. TR 199-200.

Mr. Russo also testified that he terminated the Complainant because of concerns that he was stealing supplies, stating that his mechanic had to personally give the Complainant any necessary oil or anti-freeze and that the Complainant was watched for over a year. TR 200-201. He said that knew that the Complainant was stealing because he saw the Complainant put two gallons of oil and a gallon of anti-freeze in his Jeep in late 2000. TR 201. He did not confront the Complainant about this, but rather went to his Jeep, removed the oil and anti-freeze, and left him a note that he was being watched and to stop. TR 202. He continued that he had also received numerous warnings to watch the Complainant. TR 202. He testified that he has known Michael Milano of MJM Builders professionally for the last three years, and he denied asking Mr. Milano to send the letter complaining of speeding. TR 202-203.

Lastly, Mr. Russo testified that after the Complainant's accident on April 19, 2001, he had Jimmy Carbone set the maxi-brake on Truck No. 808, put the truck in gear and attempt to move it in order to test the brakes because the Complainant had reportedly told someone on the site that the brakes were not holding. TR 206-207. He explained that this was similar to putting an automatic car in drive, putting your foot on the brake, and stepping on the gas. TR 207-208.

C. Testimony of the Complainant on Rebuttal

The Complainant was recalled to respond to Mr. Russo's testimony that he had a long history of speeding. He testified that the drivers had conversations as a group with Mr. Russo, but he denied any one-on-one conversations. TR 208-209. He added that shortly after these group conversations, the driver who was the problem would typically be gone, and he identified a driver named Joe Duck as a driver who had a lot of problems such as speeding, driving recklessly, and selling things at work. TR 209. He denied that he had a long history of speeding or reckless driving and, instead, described his driving as cautious. TR 209. In response to Mr. Russo's testimony that he had a habit of excessive downshifting, he stated that a driver has to downshift in a turn and that he was never told that he downshifted inappropriately. TR 209-210. He stated that he never had any conversations with Mr. Russo about his driving too fast. TR 210. Regarding the existence of daily work sheets and inspection sheets, the Complainant testified that there were daily work sheets, but never any inspection sheets in the trucks. TR 210-211. He testified that he would conduct a pre-trip inspection and fuel the truck everyday between 6:00 a.m. to 6:45 a.m., and he said that he only socialized with the other drivers while engaged in these activities. TR 211. He stated that he could not recall the incident with Mr. Russo's father or anyone ever talking to him about it. TR 211. He also did not recall Mr. Russo ever saying he had to save his job or something to that effect. TR 211. He remembered complaining to Mr. Russo about an axle seal leak, possibly in 2000, and stated that Mr. Russo's testimony that he never complained about the brakes to him prior to the accident was false, adding that he complained so much that Mr. Russo told him to go away about it. TR 211-212. He testified that he was told that from the time of the accident until he returned to work on May 24th, Truck No. 808 just sat in the yard and was not driven. TR 212-213. He repeated that Mr. Russo told him it cost \$7,000 to fix the truck. TR 213.

Regarding the issue of extra drivers being hired in May 2000, the Complainant testified that he was the extra driver. TR 213. He explained that there were five dump trucks and that Steve Gianelli drove the hauler only temporarily, a couple weeks at a time, and that Mr. Gianelli again drove his usual dump truck, the one that the Complainant was driving. TR 214. He added that Mr. Russo replaced him with two new drivers prior to the letter from MJM Builders, which occurred around the time that Mr. Russo stated that he had not figured out what to do yet about the drivers. TR 213-214. The Complainant testified that Mr. Russo told him that he was terminated because of the mechanical problems with the truck and because of the problems with OSHA. TR 214. He stated that the April 19th accident was not his fault as he was never told not to get out of the truck. TR 214.

On cross examination, the Complainant was asked to review his answer to Question No. 47 in his April 27, 2001 statement (CX 1) in which he stated that Mr. Russo instructed him on safety rules at the time he was hired, including not getting out of the truck while it was being loaded and chocking the wheels while the truck is parked. TR 215. He testified that this answer was false. TR 216. He stated that he had heard of wheel chocks before but insisted that he had never been told not to get out of a truck while it was being loaded. TR 216. He continued that he had been a driver for nine or ten years in April of 2001 when he was told for the first time that he should not leave a truck while it was being loaded. He also stated that loading time was the only time he had to use a bathroom. TR 216.

III. Findings of Fact and Conclusions of Law

A. Witness Credibility

Before turning to the merits, it is necessary to address the relative credibility of the two witnesses, the Complainant and Mr. Russo, whose testimony in most pertinent respects is sharply conflicting. In short, it was my distinct impression, after observing the demeanor of both witness during several hours of examination, that neither was completely forthcoming. Both witnesses showed a remarkable ability to relate events in great detail when such events were consistent with their respective positions, but they seemed afflicted with a suspiciously selective form of amnesia, characterized by frequent “I don’t recall” responses, when questioned about facts which might weaken their cause. The lack of candor by both witnesses is compounded by the absence of any corroboration by other witnesses or documentary evidence. For example, there are significant factual questions about the condition of the brakes on the truck assigned to the Complainant, whether and when the Complainant reported problems or defects, whether and when any repairs were made and, if so, the nature and cost of such repairs. Yet, neither party offered a single document or word of corroborating testimony. What is even more troubling though is the Complainant’s admittedly false statements to OSHA. While he testified that the OSHA investigators never warned him about the penalties for perjury and that he lied to protect his job, I find that this falls well short of rehabilitating his credibility. As a result of these significant problems with the reliability of both witnesses’ accounts, and my inability to determine from observations of their demeanor which of the two is the more truthful, I have credited their versions of pertinent events testimony only to the extent that their testimony is either uncontradicted or independently corroborated.

In some cases, the inability of the trier of fact to determine the credibility of conflicting witnesses will force a determination that the complaining party has not carried his burden. *See, e.g., Cook v. Kidimula International, Inc.*, USDOL/OALJ Reporter (HTML), OALJ No. 1995-STA-44 at 3 (Sec’y March 12, 1996) (approving the ALJ’s conclusion that there was an insufficient basis to find that the complainant had shown the occurrence of an adverse action by the preponderance of the evidence because of the uncorroborated, conflicting testimony of the complainant and the respondent and the judge’s inability to determine the truth through the demeanor of the witnesses). In this case, however, I am able to find, for the reasons discussed

below, that the Complainant has introduced sufficient, uncontradicted evidence to make out a *prima facie* case of retaliation. Accordingly, I will proceed to analyze the evidence to determine whether a violation of the STAA has been established despite the Complainant's lack of credibility.

B. Analytical Framework

The STAA prohibits the discharge of, or discipline or discrimination against, an employee in the commercial motor transportation industry because the employee either files a complaint or initiates or testifies in a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle in certain circumstances. Specifically, the STAA states,

- (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because
 - (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
 - (B) the employee refuses to operate a vehicle because
 - (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
 - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §31105(a). The elements of a violation of the STAA's employee protection provisions are that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there is a causal connection between the protected activity and the adverse action. *BSP Trans., Inc. v. United States Dep't Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (*Clean Harbors*). A complainant initially may show that protected activity likely motivated the adverse action by proving: (1) that he engaged in protected activity; (2) that the respondent was aware of the activity; (3) that he suffered adverse employment action; and (4) the existence of a causal link or nexus, *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon v. Consolidated Freightways*, USDOL/OALJ Reporter (HTML), ARB No. 98-051, OALJ No. 1996-STA-15 at 5-6 (ARB April 15, 1998); *Kahn v. United States Secretary of Labor*, 64 F.3d 261, 277 (7th Cir. 1995). An employer may rebut this *prima facie* showing by articulating a legitimate, non-discriminatory reason for taking the adverse action, and the complainant must then prove that the employer's proffered reason was not the true reason for the adverse action and that protected activity was the real reason for the action. *Shute v. Silver Eagle Co.*, USDOL/OALJ Reporter (HTML), ARB No. 97-060, OALJ No. 1996-STA-19 at 1-2 (ARB June 11, 1997); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

C. Protected Activity

The Complainant's activities which are asserted to be protected under the STAA fall into three basic categories – (1) his internal complaints to the Respondent about defective and unsafe conditions on Truck No. 808; (2) his testimony in the OSHA proceeding that was initiated as a result of the April 19, 2001 accident; and, (3) his refusal to drive Truck No. 808 because of its allegedly defective and unsafe conditions. Regarding the first category, it is well-established that an employee's internal safety complaints to management are protected by 49 U.S.C. §31105(a)(1)(A). *Clean Harbors*, 146 F.3d at 19-21; *Zurenda v. J&K Plumbing and Heating Co.*, USDOL/OALJ Reporter (HTML), ARB No. 98-088, OALJ No. 1997-STA-16 at 5 (ARB June 12, 1998); *Doyle v. Rich Transport, Inc.*, USDOL/OALJ Reporter (HTML), OALJ No. 1993-STA-17 at 2 (Sec'y April 1, 1994); *Davis v. H.R. Hill, Inc.*, USDOL/OALJ Reporter (HTML), OALJ No. 1986-STA-18 at 3-4 (Sec'y March 19, 1987). In addition, the *allegation* of a violation is sufficient to invoke the protection of subsection (a)(1)(A) without proof of a violation of any motor vehicle safety rule. *See Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 45-46 (2nd Cir. 1995). However, where the Respondent contests that the complaints qualify as protected activity, the Administrative Review Board (ARB) has required that the internal safety complaints be linked to a motor vehicle safety rule. *Assistant Secretary and Bates v. West Bank Containers*, USDOL/OALJ Reporter (HTML), ARB No. 99-055, OALJ No. 1998-STA-30 at 14 (April 28, 2000). Here, there is uncontradicted evidence in the record that the Complainant made internal complaints to the Respondent on May 23-24, 2001 concerning what he perceived to be defects or unsafe conditions in the brakes on his assigned vehicle, Truck No. 808. The Department of Transportation regulations prohibit a driver from operating a commercial vehicle unless he is satisfied that both the service brakes and the parking brake are in good working order. 49 C.F.R. §392.7. The Complainant also alleges that he made complaints about the brakes in April 2001 prior to the accident, while Mr. Russo disputes that he ever made any complaints to him or that he was aware of any complaints made to his mechanic, Mr. Durso, during this time. As previously outlined, I am unable to credit the Complainant's testimony about the complaints in April 2001 because of the contradictory testimony, lack of corroborating evidence, and my problems with the Complainant's credibility. Consequently, I find that there is insufficient evidence to show that the Complainant engaged in STAA-protected activity by making internal safety complaints about Truck No. 808 in April 2001. However, as there is no dispute that the Complainant made safety complaints which can be linked to a federal motor carrier regulation on May 23 and 24, 2001, I find that the evidence establishes that he engaged in protected complaint activity pursuant to section 31105(a)(1)(A).

In its Pre-Hearing Brief, the Respondent argues that the Complainant's involvement in the OSHA investigation is not protected activity under subsection (a)(1)(A) because the Complainant did not *file* or *initiate* the investigation. Rather it contends that the OSHA investigation was automatically triggered by the April 19, 2001 accident. ALJX7A at 4. The Respondent is correct that the Complainant did not file a complaint that precipitated the OSHA investigation and, therefore, his participation is not protected on the basis of filing safety complaints. However, subsection (a)(1)(A) also protects a complainant who testifies in a proceeding "related to" a motor vehicle safety standard or law. 49 U.S.C. §31105(a)(1)(A); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992), *vacated on other grounds*, *Yellow Freight Systems, Inc. v. Reich*, No. 95-4135 (6th Cir. Dec. 16, 1996)(unpublished decision available at 1996 U.S. App. LEXIS 33233)(case below, 89-STA-7) (dismissing complaint after remand based on ALJ's factual

finding that complainant testified in grievance proceeding which was too attenuated to any safety concerns). The record contains uncontradicted evidence that the Complainant testified in an Occupational Safety and Health Act (OSHA) investigation that was initiated because of the April 19, 2001 accident. Consequently, I will assume for purposes of further analysis that the Complainant's testimony to OSHA was protected activity under section 31105(a)(1)(A).⁴

In its Pre-Hearing Brief, Respondent acknowledges that the Complainant may have engaged in protected activity under subsection (a)(1)(B)(ii). ALJX7A at 4. In order to receive protection under subsection (a)(1)(B)(ii), an employee's apprehension of a serious injury due to an unsafe condition must be objectively reasonable based on the information available to him at the time of the work refusal and, despite seeking a correction of the condition, the employee must have been unable to obtain correction. 49 U.S.C. §31105(a)(2); *Brinks, Inc. v. Herman*, 148 F.3d 175, 180-81 (2nd Cir. 1998). The existence of an actual safety defect need not be proven, and the fact that a subsequent inspection affirmatively shows that there was no mechanical defect does not remove the STAA's protection so long as the analysis of the situation encountered by a driver at the time of the refusal to drive compels the conclusion that the driver's perception of an unsafe condition was reasonable. *Yellow Freight System v. Reich*, 38 F.3d 76, 82-83 (2nd Cir. 1994); *Jackson v. Protein Express*, USDOL/OALJ Reporter (HTML), ARB No. 98-104, 1995-STA-38 at 2-3 (ARB January 9, 1997). Although I have found that the Complainant did raise complaints about Truck No. 808 on May 23 and 24, 2001, I find that his actions on these dates do not qualify for protection under subsection (a)(1)(B)(ii) because, when the Complainant sought correction, Mr. Russo provided another truck which the Complainant drove for the remainder of his employment. In addition, because I am unable to credit the Complainant's testimony about his complaints in April 2001 about Truck No. 808, I find that these alleged complaints do not qualify as protected activity under subsection (a)(1)(B)(ii).

D. Awareness of the Protected Activity, Adverse Action and Causal Connection

There is no dispute that the Respondent was aware of the Complainant's protected activity when he participated in the OSHA investigation and when he made internal safety complaints on May 23 and 24, 2001. There is also no dispute that the Complainant was subjected to an adverse employment action when he was terminated on June 1, 2001. As mentioned previously, my inability to credit either witnesses' testimony as being entirely accurate complicates my assessment of the role the Complainant's protected activity played in the Respondent's decision to terminate him. However, the fact that the Complainant's protected activity was followed shortly in time by the Respondent's announcement of its decision to terminate his employment is sufficient to

⁴ Since it is my ultimate conclusion that a preponderance of the evidence in this case does not establish any violation of the STAA, I find it unnecessary to answer the question of whether the Complainant's testimony to OSHA is undeserving of statutory protection by reason of its perjurious character. *But see Johnson v. Roadway Express, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 99-111, OALJ No. 1999-STA-5 at 8 (ARB March 29, 2000) (where a driver's claim of illness is not legitimate, a refusal to drive is not protected activity).

support an inference of a causal connection between the two. *Bergeron v. Aulenback Transportation, Inc.*, USDOL/OALJ Reporter (HTML), OALJ No. 1991-STA-38 at 2 (Sec’y June 4, 1992); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Accordingly, I find that the Complainant has met his burden of establishing that the Respondent’s termination decision was, at least in part, motivated by retaliatory considerations.

E. Respondent’s Legitimate, Nondiscriminatory Reasons for Termination

Assuming that the Complainant has met his burden of proving that his termination was, at least in part, motivated by his protected activity under the STAA, the burden of persuasion shifts to the Respondent to demonstrate that it would have terminated the Complainant even if he had not engaged in the protected activity. *Pogue v. U.S. Dep’t of Labor*, 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (dual motive test set forth in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), applies where it was “undisputed” that complainant engaged in protected activity and “that this was a motive for disciplinary action”); *Passaic Valley Sewerage v. United States Dep’t of Labor*, 992 F.2d 474, 481 (3rd Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163-1164 (9th Cir. 1984). Mr. Russo testified that he terminated the Complainant’s employment because of a combination of the Complainant’s speeding and bad driving habits and a slow down in the Respondent’s workload. TR 160-161, 190-191. He explained that the primary reason was the Complainant’s speeding and performance problems, and he attempted to demonstrate the work slow down by testifying that one of the new drivers he hired on May 30 did not return the following week. TR 190-191. Given that Mr. Russo hired three new drivers at the end of May 2001 and had six drivers, including the Complainant, and seven trucks available at that time, I find that this statement about one of the new drivers not returning the following week is unpersuasive in establishing a reduction in work as a legitimate reason for the Complainant’s termination. Nonetheless, I find that a preponderance of the evidence shows that Mr. Russo terminated the Complainant because of his performance problems and that the protected activity did not play a determinative role in his decision.

Mr. Russo testified that he spoke to the Complainant about his speeding six to eight times per month and described an incident where his father observed the truck customarily driven by the Complainant being driven recklessly. TR 128-130, 137-138. He also stated that the Complainant had a problem downshifting too often, had blown out a transmission, disregarded truck maintenance, and caused unnecessary repairs to a new tire and an idler. TR 128-129, 196-2000. Mr. Russo also testified that one of his clients, MJM Builders, called and then sent a fax letter on May 29, 2001 (RX 2) to complain about speeding through his development and referenced a license plate number that Mr. Russo later identified as the truck driven by the Complainant. TR 150-158. In addition, Mr. Russo testified that he observed the Complainant stealing oil and anti-freeze and that he had reason to believe that the Complainant had taken company property on other occasions. TR 199-200. The Complainant denies that Mr. Russo ever spoke to him about speeding or reckless driving or that he was responsible for truck maintenance, and he did not “recall” the incident with Mr. Russo’s father or blowing out a truck’s transmission. TR 82-84, 98-99, 101, 112. Rather, the Complainant asserts that Mr. Russo fired him because he caused OSHA to conduct an investigation and cost him \$7,000 in brake repair because of the April 19, 2001

accident. TR 69-71, 77-80. Mr. Russo similarly testified that the Complainant's accusations are false. TR 160-166, 183-187. Although recalled to testify on rebuttal, the Complainant offered no explanation in response to Mr. Russo's allegations of thievery.

Given the Complainant's lack of credibility, I am inclined to find that the protected activity did not play a role in the Respondent's decision to terminate his employment. The Complainant admitted that he perjured himself in his first statement to OSHA on April 27, 2001, and he did not deny Mr. Russo's allegations of stealing oil and anti-freeze. I do not find the Complainant's testimony that Mr. Russo never talked to him about speeding to be credible, and I have serious doubts regarding the heart of his version of events in that it simply does not make sense that the Respondent would terminate him because of his April 27, 2001 statement to OSHA since he did not implicate the Respondent with any wrongdoing and allegedly told the Respondent that he had "covered" for them. In addition, I find that the Complainant's claim that he made repeated complaints about the brakes on Truck No. 808 during April 2001 and found them defective on the morning of April 19, 2001 to be undermined by his conduct in standing front of the truck while it was being loaded. That is, in the absence of any indication that the Complainant was experiencing suicidal thoughts at the time, it strains credulity that an experienced truck driver would stand in front of a truck with a defective parking brake while it was sitting on an incline being loaded.

However, even assuming that the Complainant's protected activity on May 23 and 24, 2001 played a role in the Respondent's decision to terminate his employment, the Respondent has met its burden of persuasion that it would have terminated the Complainant even without his protected activity. I find Mr. Russo's account that the Complainant had a history of driving problems generally credible, and his testimony that he had previously "saved" the Complainant's job despite his father's urging that the Complainant be fired for reckless driving had a particular ring of truth. On the background of this history, it is reasonable to conclude that the May 29, 2001 complaint from Mr. Milano about the Complainant's speeding was the final straw motivating his decision to let the Complainant go on June 1, 2001. Therefore, I find that the Respondent has met its burden of demonstrating that it had legitimate, nondiscriminatory performance reasons for terminating the Complainant's employment and that it would have terminated the Complainant even if he had not engaged in activity protected by the STAA.

IV. Conclusion

The Complainant has met his burden of proving that his termination was, at least in part, motivated by his protected activity under the STAA. However, as the Respondent had met its burden of demonstrating that it would have terminated the Complainant for a legitimate, nondiscriminatory reason even if he had not engaged in protected activity, I conclude that the complaint must be dismissed. *Shannon v. Consolidated Freightways*, USDOL/OALJ Reporter (HTML), ARB No. 98-051, OALJ No. 1996-STA-15 at 8-9 (ARB April 15, 1998).

V. Recommended Order

The complaint filed in this matter is DISMISSED with prejudice.

A

Daniel F. Sutton
Administrative Law Judge

Boston, Massachusetts
DFS:dmd

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978, 19982 (1996).